IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,
*Petitioner,*

v.

THE RATH PACKING COMPANY, a corporation,
*Respondent.*

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,
*Petitioner,*

v.

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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### Jurisdictional Statement

This brief is submitted on behalf of the State of New York, *amicus curiae,* pursuant to Rules 42(1) and (4) of this Court.

## Opinions Below

The cases on appeal herein are officially reported as *Rath Packing Company* v. *Becker*, 530 F.2d 1295 (9th Cir. 1975) and *General Mills, Inc.* v. *Jones*, 530 F.2d 1317 (9th Cir. 1975).

## Interest of *Amicus* State of New York

This *amicus curiae* brief is submitted by the State of New York in support of reversal of the orders of the Court of Appeals for the Ninth Circuit holding petitioner's weights and measures enforcement procedures concerning net contents labeling of meats and flour preempted, respectively, by the Wholesome Meat Act of 1967 ("WMA"), 21 U.S.C. §§ 601 *et seq.* and the Fair Packaging and Labeling Act ("FPLA"), 15 U.S.C. §§ 1451 *et seq.*, and the Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*

The general background and details concerning these appeals have been presented to this Court in the petitioner's brief. This *amicus* brief is concerned primarily with the decisions of the Court of Appeals as they may affect other states and municipalities including the State of New York and its county and city weights and measures enforcement procedures. New York's net contents labeling requirements, modeled on "Handbook 67" (Checking Prepackaged Commodities, National Bureau of Standards, U.S. Department of Commerce, 1959) are annexed as Appendix "A" to this brief.

As petitioner and others have noted, enforcement of weights and measures regulations remains the primary responsibility of state and municipal authorities, notwithstanding the enactment of federal legislation designed to provide uniform standards. Without denigrating the role of the federal government in this area, it must be emphasized that the practical problems involved with enforcement of net contents labeling laws are resolved daily by state and local agencies, with due regard for the rights of both consumers and packers. As petitioner notes, this primary responsibility of the states has been recognized in countless decisions upholding local regulation in the face of preemption attacks. New York endorses the briefs submitted on these appeals by other *amici* and petitioner herein.



The key to these appeals is Handbook 67, published since 1959 by the U.S. Department of Commerce for use by state and municipal weights and measures officials in promoting national uniformity in the inspection of prepackaged commodities for accuracy in net contents labeling.* This booklet was developed after considerable consultation with enforcement officials as well as sellers and manufacturers of prepackaged commodities. With the concurrence of both consumers and packers, Handbook 67 is in wide use throughout the nation, and provides the basis for the enforcement procedures contested herein as well as those used in New York.

California's contested regulations provide a statistical method for testing the compliance of packers with the State's accuracy requirements for net contents labeling. The statistical methodology is explained in detail in the Ninth Circuit's *Rath* opinion, 530 F.2d 1295, 1299-1300 (9th Cir. 1975) (cf. Handbook 67, pp. 13-24). Essentially, the state or local inspection official selects a certain number of valid samples from a shipment or lot of the commodity to be tested, ascertains the *average* net weight of the samples, and compares this average weight with the net contents of the commodity as labeled.

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* Handbook 67 is annexed as an appendix to the Brief of California *Amicus Curiae* in support of the petition for certiorari herein.

The California regulations do not explicitly provide for reasonable variations between this average weight and the weight as labeled, whether caused by loss or gain of moisture during distribution or unavoidable deviations as a result of the limits of manufacturing practices.

In contrast, the regulations promulgated pursuant to the WMA (21 U.S.C. § 601[n][5]) and the FDCA (21 U.S.C. § 343) provide that reasonable variations from the net contents stated on commodity labels may be permitted when caused by loss or gain of moisture during distribution or unavoidable deviations during packing.

This conflict frames the issues before the Court. Initially, the Court must decide whether the promulgated federal regulations* are unduly vague and in excess of the jurisdiction conferred upon the responsible federal officials pursuant to the WMA and the FDCA. If these regulations are found to be valid, this Court must determine whether the contested California regulations are preempted by the WMA, the FDCA or the FPLA. In view of the central importance of Handbook 67 to California's regulations and the interests of countless state and local jurisdictions, this Court should resolve the issues presented to it in the context of the effects of the decisions herein upon the vitality of Handbook 67 and its use by state and local officials across the nation.

## Summary of Argument

I. In considering whether the regulations promulgated pursuant to the FDCA and the WMA, which permit reasonable variations from the accuracy in net contents labeling requirements of those statutes, are void for vagueness, this Court should examine the federal regulations in the context of the intent of the FDCA and the WMA to permit continued state and local enforcement of their net contents labeling laws. The federal regulations, by establishing an indeterminate "reasonable variation" standard, provide no guidelines for state and local agency compliance with federal law, and should be found void for vagueness.

* 21 CFR § 1.8b(q); 9 CFR 317.2(h)(2).



II. Assuming the federal regulations permitting reasonable variations are found valid, state and local net contents labeling laws which permit reasonable variations in the discretion of state and local agencies should be found consistent with the federal regulations. Handbook 67, prepared for state and local use by the U.S. Department of Commerce, allows for reasonable variations caused by gain or loss of moisture during distribution or by deviations during manufacturing, and therefore is consistent with the WMA and FDCA, and hence the FPLA.

## I

**The federal net contents labeling regulations promulgated pursuant to the WMA and the FDCA are unduly vague and inconsistent with the intent of those acts to permit state and local enforcement of net contents labeling requirements consistent with the federal acts.**

Both the WMA and the FDCA provide, in nearly identical terms, for net weight labeling of packages. (21 U.S.C. § 601[n][5]; 21 U.S.C. 343 [e]). The two statutes require "accurate" labeling of the quantity of the package contents; both provide that "reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

Pursuant to these statutes, the Secretaries of Agriculture and Health, Education and Welfare promulgated implementing regulations. The reasonable variations to be permitted net weight labeling of meat and meat food products are established in 9 CFR 317.2(h)(2). Consumer

commodities regulated under the FDCA are allowed reasonable variations in their net weight statements pursuant to 21 C.F.R. § 1.8b(q). Both of these regulations provide that

> "[r]easonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

These regulations do not prescribe the variations that are permitted, as required by the respective statutes. Rather, merely repeating the general legislative guideline as to reasonableness, these regulations identify *causes* which may give rise to variations which can be considered "reasonable", specifying that these variations "shall not be unreasonably large."

By itself, this directive, applied by federal inspectors in the field, would not appear to be arbitrary and unduly vague. Situations vary on a case by case basis, and latitude must be allowed those charged with enforcement of the Acts. The use of the term "reasonable" has, as the court below noted, withstood charges of vagueness.

However, read in the context of the WMA and the FDCA, and considering the consequences of such regulations as they affect federal/state relationships, the subjectivity of these regulations places California, New York, and other states and localities on the horns of a dilemma. It is the contention of *amicus* that the federal regulations, examined in light of the cooperative intent of the two Acts, are unduly vague.

The FDCA contains no preemption language. It has been widely acknowledged, and the court below recognized that weights and measures regulations enforced by states and their local authorities were not to be preempted by that Act, unless there were direct conflicts which could not be reconciled.



> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent wtih those of the state to justify the thwarting of state regulation."

*Cloverleaf* v. *Patterson,* 315 U.S. 148, 156. See *Texas & Pacific Ry. Co.* v. *Abilene Cotton Co.,* 204 U.S. 426, 437; *Kelly* v. *Washington,* 302 U.S. 1, 10; *Savage* v. *Jones,* 225 U.S. 501, 533; *New York Department of Social Services* v. *Dublino,* 413 U.S. 405.

Similarly, while the WMA contains express preemption language, providing that states cannot impose any labeling requirements "in addition to, or different than" those established under the WMA, the Act also provides that any state "may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary." 21 U.S.C. § 678.

Thus, both the FDCA and the WMA recognize that states and localities may enforce weights and measures labeling requirements not in conflict with the FDCA requirements and not different than or in addition to the WMA requirements.

In order to enforce state and local laws within these strictures, however, states and localities must be able to interpret and apply the federal laws and regulations. The states and localities have attempted to do this through the federally-prepared Handbook 67, which prescribes a statistical averaging method designed to permit reasonable variations.

The Ninth Circuit, however, apparently struck down the use of this federal handbook in *General Mills,* 530 F.2d 1317, 1326-1327 (9th Cir. 1975):

> "We recognize that step 10 of the California procedure as described in the *Rath* opinion takes variations of individual packages from accurate weight into account in determining whether lots should be

ordered off sale; but these variations are evaluated solely on a statistical basis, and may be greater than, as well as less than, the reasonable variations permitted each package by 21 CFR 1.8b(q) and may arise from circumstances not recognized by the federal regulation."

How, one may ask, are states and localities to adopt procedures in compliance with federal law, when the federal regulations leave determinations of reasonableness solely in the discretion of federal inspectors? The court below was correct in noting that the "reasonable variations" permitted by California might be different than or in conflict with the reasonable variations permitted under federal law. But the court failed to come to grips with the fact that the very vagueness of the federal regulations makes it impossible for states and localities to permit reasonable variations which are the same as or consistent with the federal regulations.

Thus it may be said that the WMA and the FDCA, in directing the respective Secretaries to permit reasonable variations, contemplated that the regulations promulgated would be capable of objective application sufficient to permit continuing state and local enforcement of weights and measures labeling laws. By promulgating regulations identifying the permissible *causes* of reasonable variations, without setting forth any objective standards to measure the reasonableness of permitted variations, the Secretaries have, if the Ninth Circuit decision is upheld, effectively frustrated state and local regulation in an area long under local jurisdiction, and whose continued enforcement activities were contemplated by the WMA and the FDCA themselves.

It is not without significance that enforcement of weights and measures labeling requirements is in fact carried out in the main not by the federal government, but by the



state and local jurisdictions that have long performed this function, based on the uniform national guidelines fostered by Handbook 67.

Ironically, it must be noted that Handbook 67, produced under the auspices of the federal government for state and local use, contains an objective methodology for permitting reasonable variations precisely along the lines presumably contemplated by Congress when it authorized the responsible federal agencies to prescribe regulations permitting reasonable variations.

In establishing objective "unreasonable minus or plus errors" for the determination of the "reasonableness" of errors in individual packages, Handbook 67 makes explicit allowance for variations caused by gain or loss of moisture:

> "It will be noted that the sugested plus allowances are twice the suggested minus allowances at each labeled quantity. This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss." *Handbook 67*, p. 15.

The improper vagueness of the WMA and FDCA regulations becomes evident when one considers their practical effect on enforcement, whether it be state and local or federal in nature. Testing for enforcement purposes must be undertaken at or near the place of sale. This is implicit in allowing variations based on good *distribution* practices. Yet when an inspector discovers variations, how is he or she to determine whether they were caused by gain or loss of moisture, or by some other factor? In order to arrive at this subjective determination, an inspector would have to know how long the product was in the distribution pipeline, where it was manufactured, whether it was part of a large regional shipment or whether it was part of a shipment directed to an area where moisture loss should have been anticipated, and numerous other facts.

The practical effect of the vague FDCA and WMA regulations is to institutionalize variations, for enforcement officials cannot possibly devote the time and resources necessary to justify subjective determinations of unreasonableness, as noted above.

In contrast, Handbook 67 provides enforcement officials with a practical and fair enforcement tool which has been approved by consumers and manufacturers alike. Under this booklet, manufacturers are expected to anticipate moisture losses and gains, and to package their products accordingly. Certainly, experience in distribution should enable manufacturers to make informed judgments and to pack accordingly. Handbook 67 recognizes the limits of packers' predictive abilities, without granting them the carte blanche exception inherent in the federal regulations.

As to the Ninth Circuit's belief that Congress, by acquiescing in the regulations promulgated pursuant to the WMA and the FDCA, can be considered to have approved them, it should be noted that this acquiescence occurred in the context of comprehensive state and local enforcement of weights and measures labeling laws, and continued appropriations for the publication of Handbook 67 by the U.S. Department of Commerce.

## II

**Handbook 67 as used by petitioner prescribes procedures for enforcing accuracy in net contents labeling which are not different than or in conflict with the WMA or the FDCA.**

Assuming, *arguendo,* the validity of the regulations promulgated pursuant to the provisos of the FDCA and WMA accuracy in labeling requirements, Handbook 67 prescribes enforcement procedures which are not in conflict with or different than the federal regulations.



Those regulations require labels which accurately state the net contents of packages subject to the respective statutes, providing for reasonable variations based on gain or loss of moisture during good distribution practice and unavoidable deviations in good manufacturing practice.

As noted previously, reasonable variations caused by gain or loss of moisture are recognized in the Handbook by allowing a greater margin of error in individual packages due to overfilling. The Handbook rejects the notion that packages accurately labeled when packed may be approved upon inspection at the point of sale, though underweight, when the discrepancy is due to loss of moisture. Instead, objective allowances for variations on this ground are made, but packers who do not overpack in anticipation of moisture loss will not have their non-compliance excused merely because it was caused by moisture loss. This approach gives true meaning to the word "reasonable" in the "reasonable variations" terminology employed by the federal regulations. I.e., it is not reasonable for packers not to anticipate a certain amount of moisture loss.

This realistic view, maximizing the protection of the consumer which Congress intended, is endorsed in both the WMA and the FDCA. With respect to the WMA, see 9 CFR § 317.2(h)(8) and 16 CFR § 500.6, which prohibit the use of the phrase "net weight when packed." With respect to the FDCA, see 21 CFR 1.8b(o), which prohibits the use of qualifying phrases as to quantity, as does § 1453(b) of the FPLA. Clearly, in authorizing reasonable variations, Congress did not intend to absolve packers of any responsibility for labeling inaccuracies based on weight losses during distribution, merely because a product was accurately labeled as to net contents when packed.

Similarly, Handbook 67 permits reasonable variations caused by "unavoidable deviations in good manufacturing practice." Such variations are based on recognition of the limits of large scale packaging and weighing procedures.

The statistical or averaging method of measuring compliance under the Handbook has built into it an allowance for such unavoidable deviations.

> "Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection must be recognized and allowances for such imperfection must be made. These allowances are recognized in the 'average concept.'" *Handbook 67*, p. 5.

Put simply, by testing the accuracy of the net contents labeling of packages in a given lot against the *average* weight of the packages, the statistical method factors out those unavoidable deviations that occur from package to package because of the limits of packaging practices.

In answer to the suggestion that variations considered reasonable by state and local authorities might be inconsistent with or different from variations considered reasonable by the federal authorities, and hence preempted, this Catch-22 logic, as noted previously, would frustrate the federal/state cooperation explicitly recognized by the FDCA and the WMA. Rather, the "reasonable variations" standard promulgated pursuant to the FDCA and the WMA, if valid, must be considered broad enough to permit state and local enforcement subject to any reasonable variations employed by these enforcement authorities. To hold otherwise would be to permit federal regulations in an area acknowledged to be of primary state and local concern to be preempted simply because the federal regulations are too vague to allow for their enforcement by state and local authorities.



## CONCLUSION

**The orders of the court below should be reversed.**

Dated: New York, N.Y., June 16, 1976.

Respectfully submitted,

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## Appendix "A".

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

[Emblem]

WEIGHTS AND MEASURES MANUAL

(Rules and regulations promulgated pursuant to Section 196-a of the Agriculture and Markets Law.)

CIRCULAR 905

April, 1974

• • •

221.8 *Variations to be allowed.* (a) *Variations from declared net quantity.* Variations from the declared net weight, measure or count shall be permitted when caused by unavoidable deviations in weighing, measuring, or counting the contents of individual packages that occur in good packaging practice, but such variations shall not be permitted to such extent that the average of the quantities in the packages of a particular commodity comprising either a shipment or other delivery of the commodity or a lot of the commodity that is kept, offered, or exposed for sale, or sold, is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment, delivery, or lot compensate for such shortage. Variations above the declared quantity shall not be unreasonably large.

(b) *Variations resulting from exposure.* Variations from the declared weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure, but only after the commodity is introduced into intrastate commerce. *Provided,* that the phrase "introduced into intrastate commerce" as used in this paragraph shall be construed to define the time and the place at which the first sale and delivery of a package is made within the State, the delivery being either

(1) directly to the purchaser or to his agent, or

(2) to a common carrier for shipment to the purchaser, and this paragraph shall be construed as requiring that, so long as a shipment, delivery, or lot of packages of a particular commodity remains in the possession or under the control of the packager or the person who introduces the package into intrastate commerce, exposure variations shall not be permitted.